C. M. Brier Corporation *and* United Mine Workers of America. Cases 9–CA–27376 and 9–RC–15642

May 12, 1993

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On October 21, 1991, Administrative Law Judge George F. McInerny issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed limited exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[2]

The judge found, and we agree, that the General Counsel established a prima facie case that the employees' union activities were a motivating factor in the Respondent's March 1990 decision to close mine 2 and lay off some of its employees. Managers and supervisors of the Respondent, including its owners, repeatedly threatened employees that the mine would be closed down if the employees persisted in their union activities and/or if the Union was voted in. In addition, the Respondent engaged in other acts of intimidation, including the interrogation and the surveillance of employees. The Respondent, through its foreman, stated that mine 2 employees were laid off ''for . . . Union reasons, trying to scare the rest of the men from voting for it.'' Finally, the timing of the mine closure and the layoff of those employees in the ''hoot owl'' shift, in which the union activities were centered, lend further support to the General Counsel's case.

A prima facie case having been established, the burden then shifts to the Respondent to show that it would have closed the mine even in the absence of the union activities of the employees. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The judge found, and again we agree, that the Respondent failed to sustain its burden. In so finding, the judge relied particularly on the fact that, on learning of a problem with the roof of mine 2, the Respondent closed the mine ''casually and precipitously, even before the mine was inspected by the NMSHA'' (the National Mine Safety and Health Administration). The judge contrasted the Respondent's conduct in this respect with its reaction to what the judge termed ''a similar situation'' at mine 1 later in 1990, when the Respondent did not immediately close the mine but rather requested an inspection by the NMSHA.

In its exceptions, the Respondent contends, inter alia, that the judge erred in finding that the situations in the two mines were ''similar.'' According to the Respondent, the roof problem at mine 2 was unprecedented and precluded further operations. The Respondent contends that the General Counsel's expert witness, inspector Mark Copley of the NMSHA, testified that there were ''coal streaks'' in mine 1, and argues that such ''streaks'' did not create the same safety hazard as the more serious ''coal rider seam'' found in mine 2. The Respondent also claims that the only seam in mine 1 about which Copley testified was 6 to 7 feet above the roof.

We find no merit in the Respondent's contentions. The record as a whole supports the judge's finding that ''similar'' roof problems existed at the two mines during 1990, even if the extent of the safety hazards were not identical. Roof bolter operator Tracey Lane Dorsey testified that in mid-September, subsequent to the closure of mine 2, he drilled test holes in mine 1 and found that a 1- to 2-foot coal seam existed about 2 to 3 feet above the roof. Copley testified that the Respondent's vice president Clevinger telephoned him at that time concerning mine 1 and said, ''I've run into some bad top over here. I want you to bring your scope and we want to take a look at it. We've got to do something.'' Copley inspected the mine, and found that the top was broken up and water was leaking in. He recommended measures which would remedy a situation where ''a coal rider seam is encountered at the four foot zone or less.''[3]

When Copley inspected mine 2, after the closing, he found that the roof looked ''pretty good,'' and that,

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the first sentence of sec. III,D, par. 26, the judge mistakenly referred to mine 32. The correct reference is to mine 2.

[2] The General Counsel excepts to the judge's failure to conform the Conclusions of Law, recommended Order, and notice with his findings. We shall correct the judge's inadvertent errors and amend the Conclusions of Law, recommended Order, and notice accordingly.

[3] The Respondent incorrectly asserts that the only seam about which Copley testified was at 6 to 7 feet from the roof, which Copley discovered in October. Contrary to the Respondent's contention, Copley's testimony that is quoted in the text above refers to what he discovered at a different location in mine 1 during his September inspection. Copley used ''streak'' and ''seam'' interchangeably during his testimony. The record, however, including Dorsey's testimony, as well as Copley's testimony as a whole, supports the finding that mine 1 in mid-September contained a 1- to 2-foot coal ''seam'' at the 4-foot zone or less.

based on his inspection and what Fitzwater reported to him, the roof problem could be controlled.[4] The coal seam was running at one point in mine 2 from about 2 to 3 feet above the roof.[5] At the conclusion of his inspection, Copley recommended that he look at the roof through a stratoscope, but Clevinger declined, stating ''[W]e've decided to shut it down, so I don't see any use in it now.''

The Respondent reacted to the roof problem at mine 1 by requesting an inspection with a stratoscope by a representative of the NMSHA and employing extra measures to contain the bad top problem. By contrast, the Respondent reacted to a substantially similar roof problem at mine 2 by abruptly shutting it down without the benefit of any expert opinions and even declining roof control specialist Copley's offer of an examination with a stratoscope. In the circumstances, we agree with the judge that the Respondent acted inconsistently in two similar situations and that it has not satisfied its burden of showing that it would have closed, without further inspection, mine 2 for safety reasons in the absence of its employees' union activities.

AMENDED CONCLUSIONS OF LAW

Insert the following as conclusions of Law and renumber 6, 7, and 8 the subsequent conclusions accordingly:

''6. By telling employees that it will not sign a United Mine Workers contract, the Respondent has violated Section 8(a)(1) of the Act.

''7. By telling employees that its decision to obtain equipment necessary to continue mining operations depends on the employees' actions regarding union representation, the Respondent has violated Section 8(a)(1) of the Act.

''8. By ordering employees to stop talking about the Union while they were in its mine, the Respondent has violated Section 8(a)(1) of the Act.

''9. By threatening employees with discharge because of their union activities, the Respondent has violated Section 8(a)(1) of the Act.''

ORDER

The National Labor Relations Board orders that the Respondent, C. M. Brier Corporation, Dixie, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with closure of its coal mines in Dixie, West Virginia, if they choose union representation.

(b) interrogating employees about their union affiliations and activities.

(c) Giving employees the impression that their union activities are under surveillance.

(d) Telling employees that it will not sign a United Mine Workers contract.

(e) Telling employees that its decision to obtain equipment necessary to continue mining operations depends on the employees' actions regarding union representation.

(f) Ordering employees to stop talking about the Union while they are in its mine.

(g) Threatening employees with discharge because of their union activities.

(h) Closing its mines, and laying off, first temporarily, and then permanently, its employees because of their union activities.

(i) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer the following named employees immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. If no positions are available for these employees, on account of the cancellation of a contract or contracts between the Respondent and Bright Coal Company, or its successor, then offer to reinstate such employees to substantially equivalent positions, if and when the Respondent, or its officers, agents, successors, or assigns, resume the same or substantially equivalent operations, in the State of West Virginia, or elsewhere.

The employees in question are:

Mark Acord	Charles Hendricks
Charles Alley	Jim Hill
Herb Backus	Gary Holcomb
Larry Boggs	Larry Holcomb
Brian Brown	Mike Humphrey
Jimmy Duffield	John Kuntz
Danny Grose	Mike Lanham

[4] The Respondent's argument that Copley's inspection was not thorough and that Copley ''did not have adequate information to form an 'intelligent,' meaningful, or persuasive opinion concerning the safety of the roof'' is unavailing. Rather, it serves as a tacit admission that the Respondent made its decision to close mine 2 without the benefit of a ''meaningful'' inspection, as there is no evidence that the Respondent based its decision on information unavailable to Copley. The Respondent's further contention that Copley did not know about the existence in mine 2 of fire clay, which was revealed by geologist Gregory Smith's subsequent inspection in July 1990, is unpersuasive, since the Respondent makes no claim that it knew of the existence of fire clay in the area at the time of its decision to close.

[5] Copley's testimony contradicts the Respondent's contention that the undisputed industry practice was not to mine in areas with rider seams closer than 4 feet. Moreover, the Respondent, as noted above, in fact continued mining in mine 1 after following Copley's recommendations as to extra roof control measures to be taken when a rider seam in the 4-foot zone or less was encountered.

Robert Grose	Eddie Long
Terry Gross	James Nicholas
Terry Hamrick	Tony Taylor
Johnny Hanshaw	Scott Smith
Haymond Hanshaw	

(b) Make whole the above-named employees for loss of earnings and other benefits suffered by them by reason of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Remove from its files any reference to the unlawful layoffs and notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its business offices, and any location where it is currently engaged in the mining of coal copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 9 shall, within 14 days of this Decision, Order, and Direction, open and count the challenged ballots. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with closure of our coal mine operations if they choose union representation.

WE WILL NOT interrogate our employees about their union membership or activities.

WE WILL NOT give our employees the impression that their union activities are under surveillance.

WE WILL NOT tell our employees that we will not sign a United Mine Workers contract.

WE WILL NOT tell our employees that our decision to obtain equipment necessary to continue mining operations depends on the employees' actions regarding union representation.

WE WILL NOT order our employees to stop talking about United Mine Workers of America while they are in our mines.

WE WILL NOT threaten our employees with discharge because of their union activities.

WE WILL NOT close our mines, and lay off, first temporarily, and then permanently, our employees because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer the following named employees immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. If no positions are available, WE WILL offer to reinstate the employees to any equivalent positions available if we resume the same or substantially equivalent coal mining operations, in the State of West Virginia, or elsewhere.

The employees in question are:

Mark Acord	Charles Hendricks
Charles Alley	Jim Hill
Herb Backus	Gary Holcomb
Larry Boggs	Larry Holcomb
Brian Brown	Mike Humphrey
Jimmy Duffield	John Kuntz
Danny Grose	Mike Lanham
Robert Grose	Eddie Long
Terry Gross	James Nicholas
Terry Hamrick	Tony Taylor
Johnny Hanshaw	Scott Smith
Haymond Hanshaw	

WE WILL make whole the above-named employees for loss of earnings and other benefits suffered by them by reason of the discrimination against them, with interest.

WE WILL notify each of them that we have removed from our files any reference to his layoff and that the layoff will not be used against him in any way.

C. M. BRIER CORPORATION

Engred Emerson Vaughan, Esq.[1] and *Deborah R. Grayson, Esq.*, for the General Counsel.

Michael Klupchak, Esq. (Laner, Muchin, Dombrow, Becker, Levin, and Tominberq, Ltd.), of Chicago, Illinois, for the Respondent.

Kevin Fagan, Esq., of Charleston, West Virginia, for the Charging Party.

DECISION AND REPORT ON CHALLENGED BALLOTS

GEORGE F. MCINERNY, Administrative Law Judge. This matter originated with the filing of a petition by United Mine Workers of America (the Union) with the Regional Director for Region 9 of the National Labor Relations Board (the Regional Director and the Board) on February 14, 1990,[2] as Case 9–RC–15642. In this petition the Union asked for a Board-conducted election among employees of C. M. Brier (Brier or Respondent) to determine whether the Union represented a majority of such employees. On March 16, the Regional Director approved a stipulation calling for a secret-ballot election among Brier's employees on April 5.

Before the election could be held, a charge was filed by the Union against Brier on March 22 in Case 9–CA–27376 alleging that Brier had discriminated against its employees in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

At the election on April 5, 21 individuals who appeared and attempted to vote were challenged by representatives of Brier on the grounds that these people were not employees of Brier. The Union filed an objection to conduct by Brier alleged to influence the outcome of the election.

On April 20, the charge in Case 8–CA–27376 was amended to include the names of 23 employees allegedly discriminatorily laid off or discharged by Brier. On May 1, the Regional Director, on behalf of the General Counsel of the Board, issued a complaint alleging that Brier had violated Section 8(a)(1) and (3) of the Act including the discriminatory layoff of 23 of its employees.[3] On May 4, the Regional Director issued a report on the Union's objection to the election and Brier's challenges to the votes of 21 of the laid-off employees. The Regional Director recommended that the objection not be considered, since, in his opinion, it was not timely filed, recommended to the Board that a hearing be held to resolve the challenges to 21 employees' ballots, and that the matter be consolidated with Case 9–CA–27376 for hearing.

On June 5, the Board issued an Order directing that Case 9–RC–15642 be consolidated with Case 9–CA–27376, and that a hearing be held to resolve the issues raised by the challenges to the ballots of the 21 challenged employees.

By further order of the Regional Director, those matters came on to be heard before me in Charleston, West Virginia, on July 30. At that time, however, the Union had filed another charge, alleging that another employer was involved as a joint employer in these cases. Since the matter had to be investigated, the General Counsel joined with the Union to request that the cases be continued until the new allegations could be properly investigated. Accordingly, and over the strenuous objections of Brier's counsel, I granted the motion to continue and adjourned the matter sine die.

Upon investigation, it turned out that there was no joint employer factor here. The cases were rescheduled, and were heard at Charleston on October 23, 24, and 25.

At this hearing all parties were represented by counsel, had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argue orally. Following the close of the hearing the Respondent and the General Counsel filed briefs, which have been carefully considered.

Based on the entire record, including my observations of the witnesses, and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, C. M. Brier Corporation, is a corporation which at all times material had an office and place of business in or near Dixie, West Virginia, where it was engaged in the business of mining coal. In the course and conduct of its business, Respondent provided services valued in excess of $50,000 for nonretail enterprises located in the State of West Virginia, each of which, in turn, sells and ships goods and material valued in excess of $50,000 directly to points outside the State of West Virginia.

The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] Vaughan appeared at this hearing only on July 30, 1990. Grayson continued to represent the General Counsel throughout the hearing, and filed the brief.

[2] All dates herein are in 1990 unless otherwise specified.

[3] The Respondent filed a timely answer denying the commission of any unfair labor practices.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the United Mine Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Introduction*

Brier was engaged as a contract miner of coal since August 1989[4] at two adjacent mines in or near Dixie, Clay County, West Virginia. The entrances to these mines, known as Brier 1 and 2[5] were at ground level and they were driven horizontally into the mountains at right angles to each other. At the time of this hearing mine 2 extended underground through the mountain for about one mile.[6]

The owner of the property under which these mines were located, or at least the owner of mineral rights to the property, was Bright Coal Company, later Bright Coal Group Inc., and then BGI Division of a company called NERCO, all of which entities will be referred to as Bright, or Bright Coal.

Bright Coal contracted with Brier, and its predecessor, Hill Enterprises, to come in as what was described as an ''independent contractor'' to mine coal in accordance with a ''mining plan'' developed by Bright Coal engineers, and using mechanical equipment owned by Bright. Brier was to have full responsibility, within the limits of the mining plan, to purchase tools, obtain licenses, observe safety and ecological standards, hire, pay, provide insurance, and have total control of employees, and to mine the coal at a fixed per ton, delivered to the mine entrance.

Mine 2 was composed of five passageways, or entries, each 20 feet wide, through which passed incoming fresh air and outgoing exhaust air, a series of belts to carry mine coal out to the entrance, and passages for men and equipment to reach the mining area, and return. After each 20 feet, pillars were left as supports, and cross-passages, also 20 feet wide, were cut between the entries again leaving pillars at each 20 foot interval.[7]

The width of the mine, then, would appear to be about 180 feet, 100 feet of passageways and 80 feet of pillars, all of this extending for a mile in an easterly direction from the entrance. The mining plan prepared by Bright Coal's engineers projected a continuing drive to the east into an area containing, according to engineering estimates, a million tons of recoverable coal. Gary Criste, one of Bright' engineers from 1986 to 1990, estimated that the extraction of these ''reserves'' would have taken 4 to 5 years.

Unfortunately, these bright prospects were not to be realized. On November 27, 1989, the easterly drive was halted by a formation of sandstone, referred to as ''fault,'' a hard rock deposited, in the view of Respondent's expert witness, Gregory Smith, by a street which some time in the past had cut through the coal deposits and left silt, which, in turn, had hardened, over the ages, into this sandstone fault in the Brier 2 mine. This, of course, required some revision to the existing mining plan, so Paul Clevinger, Respondent's vice president, and a 50-percent owner of Brier, contacted Tim Ross, director of operations for Bright Coal. Ross decided that Brier would turn the mining operation to the north and drive in that direction, probing to the east as they proceeded, to see if a way around the fault could be found. Clevinger stated that as they advanced to the north the fault continued on the east, eventually cutting into the entries on the east to the point that the air intake entry was affected. In addition, they arrived at a place where there was only a hundred feet or so of cover and the coal began to be mixed with dirt.[8]

About January 30 Clevinger checked with Ross again. Ross told him to ''pillar back,'' a process whereby some of the coal seam in the pillars, left as they mined through, would be recovered as they moved back, abandoning the mine as they went. After this was accomplished, they turned and began to drive south, again alongside the fault, to see if they could either find a way around the fault, or failing that, according to Clevinger, to come out on the side of the mountain, then reenter beyond the fault to reach the reserves, and install a system of belts to move the coal from the reserves out one opening, back in the other and thence through the existing entries of mine 2 to the original entrance where the coal would be cleaned and trucked out.

On the night of March 1 and 2, John Kuntz, a maintenance employee on the night shift, while in mine 2, was drilling test holes in the roof preparatory to bolting the roof (or top) to stabilize it and ensure safe working conditions for the miners working below.[9] The first holes drilled in the roof of the farthest entry to the left were satisfactory, but at three other entries Runtz encountered only 18 inches of rock, then ran into coal which extended as far as his drill penetrated, 6 feet, into the roof. This created a problem because coal, being soft, does not provide a firm anchorage for the roof bolts. Kuntz reported this to Fine Foreman Richard Fitzwater.

Later in the morning, on March 2, when the first shift arrived at the mine face, employee James E. Nichols reported that his supervisor, Mike Gunning, received a telephone call, then told the bolting crew to go and test entries 1, 2, and 3. Nichols reported 31 to 36 inches of ''good top'' coal.[10] After this the crew was ordered out. When they reached the outside, Clevinger told them he had to contact a mine inspector and get the top checked out. The employees were sent home.

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[4] Brier succeeded another contract mining company, which had, according to testimony here, gone bankrupt.

[5] Also known as Grassy Fork Complex, Barbara Lynn mines 2 and 3.

[6] Mine 1 was involved in the representation case, but only partly concerned in the unfair labor practice portion of the case. There is no evidence of the extent of mine 1, except that it was not as productive as mine 2.

[7] The pillars were composed of coal and rock, the amounts of each depending on the thickenss of the coal seam at each pillar. The pillars appear on the maps submitted in evidence here to be about 20-feet square.

[8] If they had continued on, they, the would have come out in a valley, or hollow, outside of the mountain.

[9] Drilling of test holes was customary mine safety practice.

[10] This testimony was verified by Larry Holcomb, another bolter on the first shift, who was sent by Gunning to test drill in entries 3, 4, and 5. Holcomb encountered the same 31 to 36 inches of rock, then into ''coal or something soft.''

B. *The Union Organizational Campaign*

In the meantime, about January 15, according to Jimmy L. Duffield, an electrician and general laborer on the second shift (about 3 to 11 p.m.) in mine 2, ''quite a few'' of the employees were upset with the Company, and Duffield, who was a member of the United Mine Workers Union, contacted the Union and a meeting was arranged for January 21. Twelve or thirteen people showed up for the meeting (two of these were employed at the cleaning and preparation facility, or tipple, located outside the mine entrance and were not employed by Brier). At this meeting, the Brier employees, all of whom were from mine 2 and the late night, or ''Hoot Owl'' shift[11] signed cards and subsequently wore UMW or ''Vote yes'' stickers on their lunch pails or on their hard hats.

On January 22[12], the Union sent Brier a letter notifying the Company of the Union's organizing campaign. A petition for an election among Brier's production and maintenance employees at Dixie, West Virginia, was filed on February 14 in Case 9–RC–15642. A stipulated election agreement was executed by the parties on March 5 and 6, approved by the Regional Director on March 16 and election was set for April 5. As I have noted above, an objection and challenges were filed by the Union, some of which challenges are the subject matter of this present decision.

C. *The Company's Reaction*

1. Paul Clevinger

Brier's reaction to the union campaign was less than enthusiastic. Much of the Company's early response to the union activity was conducted by Paul Clevinger.[13] Jimmy Duffield testified that Clevinger and Richard Fitzwater, the mine foreman and chief electrician met with a group of second-shift employees before the first union meeting of January 21 in mine 2. Clevinger told these employees that he had heard rumors that the men were talking about signing cards and getting union representation. He told the employees that they had a ''good thing going there'' and that they did not want or need a union. Other employees echoed Duffield's description of this meeting, the substance of which was repeated with other groups.[14]

After the union meetings had begun, on February 20, Duffield described a meeting for a larger group of employees at which some man with ''Virginia tags'' on his car showed movies about strikes. Clevinger gave a talk about everything going well and how they did not need a union. At one point Clevinger ''grabbed'' a UMW contract, said there was ''no way in H.E.L.L.'' that he was going to ''sign that thing,'' then slamed the contract down on the table in front of him. At this, the man from Virginia ''jumped up'' and said that Clevinger ''didn't mean that he wouldn't sign a contract if you got a Union,'' but ''he wouldn't sign that.'' Clevinger did not comment on this.[15]

Brian Brown, a bolter on the first shift at mine 2 was injured in December 1989. He returned to work on light duty on the night (Hoot Owl) shift on February 26.[16] About a week after mine 2 had been shut down Brown returned to the office and asked Clevinger about the conditions in the mine. Clevinger said that Bright Coal was in the process of deciding ''up to what happened to the Union whether or not Bright would'' pay for equipment to drive through the fault.

The complaint in this matter was amended at the hearing to include an additional allegation of 8(a)(1) violations of the Act that Clevinger conveyed to employees the impression that their union activities were under surveillance by Brier, and that he interrogated employees about their union activities.

At a meeting on January 19 with second-shift employees, Clevinger was quoted by Jimmy Duffield as saying that he had heard rumors that employees were talking about signing union cards. Junior Evans reported that at a meeting, also on January 19, Clevinger said he knew there was a union meeting on Sunday (January 21). At another time Evans said Clevinger told him that he had heard there were enough cards signed, then asked what Evans had heard. Bernard Backus testified that he and another employee, Mark Acord, were approached by Clevinger on January 19. Clevinger said to them that he could not ask them if they were going (to the union meeting) but he would like to know. Acord denied that he was going, and Backus said, ''I probably told him that, too.''

Clevinger denied that he had told employees that the mine would close if the Union came in, and he denied that he told employees that he knew who supported the Union and who did not.[17] His memory on other allegations was uncertain. He did not recall that he told Evans that enough cards were signed, or that he told employees he knew about a union meeting, or that the decision to obtain equipment necessary to continue mining depended on the employees' actions regarding the Union.

Clevinger is no fool. He is smart, alert, and articulate. His hesitancy and claimed lack of memory persuaded me that it was not his memory, but his candor, which was at fault. The testimony of the several employees who talked of incidents in which Clevinger was involved I find to be credible, and I find that Brier has violated Section 8(a)(1) of the Act by impliedly threatening to close the mines if the employees selected the Union as their representative; by telling employees that he would not sign a UMW contract;[18] by telling employees that Brier's decision to obtain equipment necessary to

[11] This shift performed maintenance duties in both mines, including the difficult and lengthy task of moving the belts which carried the coal from the mine face out to the entrance.

[12] All dates herein are in 1990 unless otherwise specified.

[13] Clevinger handled the actual mine operations for Brier, while Don Maynard handled the paperwork and administrative matters.

[14] Testimony of Robert Grose, Arid Hanshaw, and James E. Nichols. Junior L. Evans, and employee at mine 1, talked about a meeting on January 19, at which Clevinger said that he could not talk about shutting down the mine, because of ''labor charges'' but that he got $13 a ton for coal, and did the men think he would stay there (after the Union came in).

[15] This testimony was corroborated by employees Junior Evans and Tracey Lane Dorsey.

[16] Before that time Brown had signed a card and attended union meetings. When he came back to work he wore union stickers on his dinner bucket and on his hat, and had handed out union stickers to other employees.

[17] There is ample evidence that most union supporters had union stickers posted on their hats, dinner buckets, or pickup trucks, or all three.

[18] Clevinger admitted this, but did not say that he would sign another type of contract with the Union.

continue mining operations depended on its employees' actions regarding union representation; by giving employees the impression that their union activities were under surveillance; and by interrogating its employees about union activities.

2. Don Maynard

Sometime after the first union meeting on January 21, Junior Evans testified that he had gone outside the mine to get some tools, and was talking with Maynard in front of the office. Maynard asked Evans if he knew where Maynard could get some tires and wheels for a box trailer which was on the property. Evans said no, and asked why. Maynard replied that depending on what came out of the ''Union deal'' the Company might want to ''load up and move out.''

In other incidents mentioned in an amendment to the complaint allowed at the hearing Jimmy Duffield stated that about a month before the union campaign started, Maynard said to Duffield and two of the Grose brothers, Robert and Tony, that he had heard some rumors about union activity. He told the employees that if they went Union, Clevinger would be ''back to Kentucky.''[19]

A similar remark was reported by Michael Lanham, who testified that, in December, he, Terry Hamrick, and perhaps other employees, were in the ''light house,'' or lamp house, when the subject of the Union was brought up by one of the employees. Maynard stated that he had worked for NERCO before, and that they ''wouldn't have no Union in there. Before they went Union they'd go back to Kentucky.''

In response to these allegations, Maynard, like Clevinger had only a vague memory of specific incidents, but he did deny that he had threatened to return to Kentucky, or that he wanted tires for the box trailer to ready the vehicle to pull out of the area.

Again, I found the employees to be credible witnesses, and Maynard's partial denials of wrongdoing did not impress me. Thus, I find that Respondent, through Maynard's statements to employees had threatened, I think directly, rather than impliedly, as alleged in the complaint, to close down Brier's operations if the employees chose the Union, and this violated Section 8(a)(1) of the Act.

3. Jerry Taylor

Jerry Robert Taylor, the section foreman on the second shift at mine 2, was named in the complaint as having made several statements to employees threatening, or implying, that the mine would be shut down if the men chose the Union as their representative.

Jimmy Duffield, whom I have found to be a credible witness testified that on February 6 he and a group of employees were eating dinner in a ''dinner hole''[20] in mine 2. Taylor said something about signing cards, then said ''all you boys are going to do put us all out of jobs[21]—. They are going to shut this mine down. There is ways of doing it legal. They don't have to worry about this Union—we'll shut her down if you go Union.'' This testimony was corroborated by Mike Lanham.

A few days later, Duffield recalled, just he and Taylor were eating dinner, when Taylor said that ''we are going to shut [this] Mine down and none of us will be working.''

After another few days, Duffield testified that he heard Taylor and Charlie Alley in an argument about the Union. Alley mentioned a Supreme Court ruling against textile factories and said they could not shut the mines down because of a union. Taylor kept telling Alley that there were legal ways of doing it. Duffield described this exchange as a ''pretty hard argument.'' In his testimony, Alley corroborated what Duffield had said.

On February 14, while the men were ''pillaring back'' from the northward section of the mine Duffield and two other employees were setting timbers. Taylor came to where they were working and said they were not setting the timbers right. He then told Duffield that he was nothing but a trouble maker for starting this ''Union stuff.'' Duffield asked if they were going to fire him and Taylor said yes, that Duffield had better keep his nose clean, and that the word was out to fire him. Taylor then added that when Duffield returned the next day he wanted ''the Union sticker off your hat.'' About an hour later Taylor came back and told Duffield that he ''was just joking a while ago. You just forget about what I said a while ago.''

Another incident involving Taylor occurred on February 19 when the second shift was on the way into the mine riding in a so-called man trip vehicle. They had stopped about half way between the entrance and the mine face, when Taylor said that he had sent Scott Smith home for 3 days for cursing him, and that he was not going to have anyone cursing him or talking back to him. He then went on to say ''While we're on the subject, this Union talk that you all are talking, I want it stopped underground as of now—if it's not stopped I will stop it if I have to take you out.''[22] Both Alley and Lanham corroborated this testimony.

Brian Brown testified that about February 27 he overheard employees at the dinner hole say that the Company could not shut the mine down because of the Union. Taylor disagreed and said that they could shut down. Later Taylor told Brown that Brier could close the mine and that the ''guys had better open their eyes up because Briers could—Paul and Don could go either way.''

Taylor admitted in his testimony that he had told one employee that he thought the mine would close down if the Union came in, but denied that Clevinger or Maynard ever told him that. He also admitted that he did say, on the man trip, that there was a lot of union talk and that he had asked the men to wait until Taylor did not recall the conversation in which he was said to have called Duffield a trouble maker. Nor did he recall saying that the mine was shut down because of the Union.

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[19] Maynard and Clevinger lived in Kentucky and returned there on weekends. I infer and find that these remarks were intended to warn employees that the Company would close down if the Union came in.

[20] Described by Duffield as a clean place, ''not all junked up'' where the men could keep their dinner buckets, and set down to eat dinner.

[21] In fact, when mine 2 shut down, the section foremen, as well as the rank-and-file employees, were laid off.

[22] This last was not explained. We do not know whether Taylor was threatening to suspend employees, as he had Scott Smith, or whether he was proposing a fist fight with those who violated his rules.

Taylor, like other line supervisors, Hartley, Gunning, and Shawkey, testified that he told employees that it was ''only'' his opinion that the mine would shut down if the Union came in. I do not agree with the General Counsel that these witnesses ''appeared to have been carefully coached'' to qualify statements about the mine closing as only an expression of personal opinion.[23] But I do think an inference is permissible that these supervisors were advised either by management, or by consultants hired by management during the union organizational campaign, not only that they could express their ''opinions'' to employees if asked, but that there were legal ways to shut down the mine despite what the Supreme Court might have ruled in other situations.

With this in mind, I credit the testimony of Duffield, Lanham, Alley, and Brian Brown, and I do not credit Taylor's denials, or failure to memory, as to the incidents reported by the employee witnesses.

Therefore, I find that by threatening employees that the mine would be closed if they persisted in union activity, and by threatening Jimmy Duffield with discharge because of his union activities,[24] and ordering employees to stop talking about the Union while they were in the mine, all violated Section 8(a)(1) of the Act.

4. Jeff Hartley

Hartley was a maintenance supervisor on the midnight shift. Junior Evans testified that after the first union meeting (January 21) Hartley spoke to him about the Union, saying that he would like to see it go union, but that Clevinger would shut it down if it did go union. Hartley himself admitted that several employees, including Robert and Troy Grose, Tony Taylor, and Gary Ho]comb asked him if the Company would close if the Union came in. In Hartley's words, he said that he ''could not speak for the Company,'' but for himself. ''I think they will.''

In the week following the union meeting, as Robert Grose testified, Hartley and he were on the man trip riding into the mine. According to Grose, Hartley asked him if he had signed a union card. Grose replied that he had and asked Hartley if he wanted to sign one. Hartley laughed at this, then told Grose that Clevinger knew about the meeting and who had gone to it.

As I have credited Evans throughout, I credit him in this instances. I find that Hartley did say Clevinger could close the mine if the Union came in, and that this is an additional violation of Section 8(a)(1) of the Act.

With respect to the conversation with Robert Grose, Hartley claimed not to remember this conversation. I credit Grose, and find that the conversation did take place as he described it. These constitute additional violations of Section 8(a)(1), by creating the impression, from the words of a supervisor, that the union activities of employees were under surveillance by management, and, in addition, by Hartley's interrogation of an employee not identified in the record as any more than a union card signer. *Rossmore House*, 269 NLRB 1176 (1984).

5. Mike Gunning

Gunning was the supervisor of the first shift in mine 2. James E. Nichols[25] testified that a day or two before the March 2 layoff the whole day shift was on board the man trip going into the mine when Larry Boggs, an employee said that he believed that if Brier went Union they would shut down mine 2. Gunning agreed, and said that ''he'' would shut down if they went Union. Later that day Nichols and Larry Holcomb were working together with Gunning and Nichols asked Gunning if he thought ''they'' would shut down if the Union came in. Gunning hesitated for a minute and said that he did not know about the rest of them, ''but I'm going to look for a job.'' This conversation was corroborated by Larry Holcomb.

Gunning did not recall being asked about the Union, but said he might have been. He did recall, like the other supervisors, saying that it was his opinion that the mine would close if the Union came in.

Again I credit the employee witnesses here as being candid and open in their testimony. Gunning's testimony is almost identical with other supervisors in forgetting any talk about the Union, or closing the mine, except for the qualification: ''in my opinion,'' on a subject with which a supervisor would be presumed to have some familiarity.

I, therefore, find that in these two instances in late February, Respondent, through Gunning's remarks, violated Section 8(a)1) of the Act.

6. Charles Shawkey[26]

Shawkey was a foreman on the day shift at mine 1. On March 5, after mine 2 had been shut down and the employees of that mine, together with the ''Hoot Owl'' shift which serviced both mines had been laid off, Junior Evans testified that he asked Shawney in the presence of Mike Moore why he thought those employees had been laid off. Shawkey said, ''for the Union reasons, trying to scare the rest of the men from voting for it.'' Shawkey then asked Evans if he thought ''Paul and them are so dumb that they think those men can't vote, if they are laid off?'' and Evans replied, ''probably.''

Shawkey admitted he had said that the Company shut down mine 2 to scare other employees who were for the Union, but he claimed he said it to Mike Moore, who rode to work with him. According to Shawkey, Evans must have heard of the remark from Moore, or someone else.[27]

Evans was, as I have found, a candid and credible witness. I believe his story that Shawkey made the remark about Respondent's motivation in his presence. Shawkey admitted making the remark to Moore, but not to Evans. It makes lit-

[23] I do agree, however, with the General Counsel that there was rather too much similarity in the disclaimers of these supervisor witnesses to be entirely coincidental.

[24] I do not believe that Taylor's later disclaimer, on the grounds that he was ''only joking'' is sufficient to erase the unlawful effect of his prior remarks; *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

[25] Nichols's name is spelled as it appears in the record. He was identified in the original complaint as ''Nicholas,'' and in the General Counsel's brief as ''Nickles.''

[26] Shawkey was identified in the original complaint as ''Shankey.'' The complaint was amended to correct this.

[27] Moore was alleged in the complaint to be a supervisor, but this allegation was specifically denied in the Respondent's answer. No evidence was introduced on Moore's supervisory status. In these circumstances I am constrained to find that the allegation as to Moore's status as a supervisor has not been proven, and that he is an employee within the meaning of the Act.

tle difference, since both Evans and Moore are employees, and the threatening nature of the remark is the same whether made to an employee on the job, or to an old carpool friend. I find that Shawkey's remark constituted an implied threat that if the mine 1 employees did not heed the fate of their fellow workers in mine 2, they themselves would suffer the same fate. This is a further violation of Section 8(a)(1) of the Act.

D. *The Closing of Mine 2*

On the basis of the evidence I have heretofore recounted, and the conclusions I have drawn from that evidence, it appears that there were a number of threats, direct or implied, all emanating from, or attributable by inference, to the owners of Respondent, that the mines would close if Respondent's employees exercised their statutory rights to select the Union as their collective-bargaining representative.

Under the evidence here it is undisputed that the union activity at Respondent's two mines was centered, and most widespread, in mine 2 and on the midnight maintenance shift.[28] This could lead to an inference that mine 2 and the midnight shift were laid off because this would cut out of the unit the bulk of the union adherents, as well as furnishing an example for the others, the employees remaining at mine 1.

These facts led the General Counsel to argue that the closing of mine 2 and the layoff of the midnight shift were based on Brier's desires to avoid bargaining with the Union, and to rid itself of union adherents for the present and for the future.

If I believe the General Counsel's witnesses, which I do for the most part, then I think that she has established a prima facie case not only that Respondent violated the law, as noted above, but that it closed the mine 2 in retaliation for the employees' disregard of the warnings and threats made by company officers and supervisors. *Wright Line*, 251 NLRB 1083 (1980).

Under the *Wright Line* formulations, then, the burden falls on Respondent to show that it closed mine 2 not because of the union activities, but because it would have closed the mine no matter what its employees had been doing.

In this regard, there are factors which tend to support the Respondent's position, and which are undisputed. The fact that the sandstone fault exists and blocks the eastward drive of mine 2 toward the million tons of coal reserves ahead is undisputed. The fact that the alternative drive north to outflank the fault failed because the mining plan set up by Bright Coal for the northward drive was intersected and effectively blocked by the fault, is likewise undisputed.

But then, as Brier, with the concurrence of Bright Coal, pillared out of the north extension and began driving south, there are questions raised in the testimony about how far they were going to go south, what would happen at the end of the southern turn; or what they would do if the southern move did not, like the drive northward, work out successfully.

Once the northern operation was called off, about January 30, the reports that employees received from the Company's owners and supervisors were divided between two alternatives.

According to testimony of Charles Alley, about February 16, a few days after they had pillared back from the northern area, Richard Fitzwater told him that they were going to drive through the fault and that once they were through, there was 10 to 15 years work ahead of them.[29]

Jamie Nichols recalled that Paul Clevinger told employees at a January 19 meeting that there was 15 years work ahead of them. He repeated that at the meeting, and told employees that the fault was about 150 feet thick, and then they had another 150 feet of 24 inches of coal, then a seam 48 inches high. He again said that there were 15 years of work there, and that the future looked good.

There were also references to coal deposits behind where they were mining and off to the north of mine 2.[30] Brian Brown testified that Don Maynard told him around April 2, a month after the shutdown, that the Company had lost the contracts on mine 2, but that there was plenty of coal ''back of Leatherwood'' (the tract to the north) and they could mine that. Larry Holcomb talked of a conversation with Richard Fitzwater, while they were pillaring back from the northern extension, in which the latter said that if they could not get through the fault, and if the turn to the right (south) did not work, there was a ''block of coal'' behind them. Holcomb said that Fitzwater added to this statement the words ''after we seen what was going to happen.'' Holcomb asked if he meant ''about the Union,'' and Fitzwater said, ''Yes.''

Clevinger's testimony on this seemed to imply that there was coal off to the north of mine 2, but he said that right Coal did not want Brier mining off to the side of the main portal area for mines 1 and 2, and besides, the coal was ''too dirty to mine out there.''

Another possibility discussed during the winter of 1989–1990, was that of extending the turn south to reach the surface at what Duffield referred to as a hollow, or a ''big valley.'' Then they would reenter the mountain at a point where the reserves lay, beyond the fault, bridge the hollow and bring the coal from the reserves through mine 2 to the tipple at the entrance. Fitzwater apparently discussed this possibility with Duffield.

Clevinger admitted that this possibility was discussed between himself and Tim Ross, vice president and director of operations for Bright Coal and that Ross had agreed to let Brier try to drive south to the surface, then reenter the mountain to reach the reserves, and belt the coal back in through mine 2.

[28] There was little evidence of union activity at mine 1. Only two employees from that mine attended the January 21 union meeting, and only a few employees at mine 1 wore stickers, or otherwise openly supported the Union.

[29] However, Gary Criste, who was in charge of engineering for Bright Coal from November 1986 to March 1990, testified that there were about one million tons of coal beyond the fault. He estimated 4 or 5 years work on this reserve. My own estimate, based on the million-ton figure, and dividing that figure by the 15,000 tons of coal required to be produced by Brier each month under the contract between Brier and Bright Coal, would indicate that there would have been about 5-1/2 years work in mine 2 beyond the fault.

[30] There also were references to the purchase of new equipment for both mines 1 and 2. Clevinger testified that Bright Coal was going to furnish new mining machines, bolting machines and mine buggies for the mines, costing about $1.4 million. He admitted that he had talked to employees about this.

All of that, however, was forestalled by the events of the nights of March 1–2. On that night John Kuntz,[31] a maintenance man on the midnight shift, was bolting test holes in the roof of the south face of mine 2 in place of another employee who was on a break. He testified that the farthest entry (out of five entries) to the left had no problem, but as he proceeded two entries over, he encountered a hole where, after drilling 18 inches of rock he encountered nothing but coal up to 6 feet above the roof line. He notified Fitzwater about this because, as he put it, he ''didn't want to send miners under that stuff. It's unsafe.''[32]

Later that morning the first shift reported to work as usual. After they reached the working face, Supervisor Mike Gunning received a phone call. According to Larry Holcomb, Gunning told him to back the mining machine out and to get Bernie Backus and Mark Acord, the bolting crew, to drill test holes in the roof. Backus testified that they used a 7-foot drill and encountered, first, 3 feet of rock, then 2 feet of coal, some softer rock, and coal again. At the top of the 7-foot drill the material was soft. Backus reported this to Gunning, adding that it ''wasn't no worse than anything else we went through.''[33]

After this report, Gunning called the surface, then ordered the men to back up the equipment and the crew left the mine. When they arrived at the entrance, Clevinger told them that he had to call the mine inspector and get the roof checked out. The men were sent home and the mine was closed.

Clevinger then consulted with Tim Ross from Bright Coal about the possibility of Bright financing a drive through the fault and a low coal area beyond to the reserve area. Bright had estimated the costs of doing this. In January and early February they had had a series of test borings made from the top of the mountain in which mine 2 was located, and determined that the fault lying in front of the eastward face of mine 2 was about 100 feet thick, with another 650 feet or so of low coal to reach the reserves. An estimate of the costs necessary to drive through the rock and low coal was prepared on February 15 under the direction of Gary Criste, Bright Coal's chief engineer, based upon the results of the test borings made in January and February. This estimate projected a total cost to drive through the rock and low coal area to be $752,778.[34]

Whatever his reasons, Tim Ross told Clevinger on the morning of March 5, that Bright would not undertake to finance Brier in driving through the fault and the low coal area. If his reason was financial, and the figures submitted by Respondent indicate that in a low-margin operation, an additional three quarters of a million dollars, or 75 cents for each of the million ton reserve, might logically be more than Bright was willing to invest in that mine.

It seemed clear, also, that Brier did not process the assets necessary to drive through the fault. I have no reason to doubt Clevinger's statement that he and Maynard formed C. M. Brier in the fall of 1988 with a total capitalization of $40,000. I also have no reason to doubt the general accuracy of a portion of a financial statement introduced by Respondent and showing that Brier had total assets of $150,670.72 as of March 31, 1990. In these circumstances, I find that it would have been difficult, if not impossible, for Brier to raise an amount which was almost seven times its total assets, to finance the drive through the fault.

There remain questions as to the seriousness of the roof problems at the south face in early March, and what, if any, alternatives Brier was facing if it was to continue driving south.

As a threshold question, why did not Brier just move back a few feet, or a few hundred feet, and begin a new drive south? There is no evidence that anything like this was considered, but Clevinger did state that Brier had to follow the mining plan prescribed by Bright, and there is no indication in the record that Bright was asked for, or proposed, any alternative to the current southern extension of the mine.

As to the safety question, I have noted the differences of opinion among the experienced employees who would be working under the roof of the mine. In addition there were two expert witnesses, one presented by the General Counsel, and the other by Respondent.

Turning to the expert witnesses, the General Counsel called on Mark Copley, a coal mine safety and health inspector assigned to the Mt. Carbon, West Virginia office of the National Mine Safety and Health Administration (NMSHA). Copley had been a coal miner for 16 years, working his way up to certified foreman in the State of West Virginia. After this, he served with the NMSNA for 20 years, the last 4 of which were as a Roof Control Specialist. Added to his working experience, Copley has had constant training in mine safety and roof control.

Copely testified that he had been familiar with mine 2 since it started in 1987 or 1988. He had assisted in devising a roof plan[35] for this mine. When Brier took over, they wrote

[31] Kuntz was presented as a witness by Respondent. He was not asked about his union activity but a prior witness, Robert Grose, testified that Kuntz was one of those employees on the Hoot Owl shift who wore a union sticker on his hat. Kuntz was working for another mining company at the time he testified, but there was no indication or evidence that his testimony was influenced by any connection between himself and Respondent. I find him to be a credible witness.

[32] There was some indication on the afternoon of February 28 that there might be problems with the roof at the south face. Michael Lanham testified that he was asked to drill test holes in the roof. He only drilled two holes because the bolting machine broke down, but he found about 24 to 30 inches of rock, then coal up to 5 feet. Lanham reported this to Taylor, his supervisor, who told him that he would report it to Clevinger and Maynard.

[33] Backup's testimony was corroborated by Holcomb and Jamie Nichols, first-shift employees.

[34] This figure does not include the sale of 10,000 tons of coal salvaged from the low coal area as they went through. The data for that coal shows that Bright estimated it would realize $17.12 a ton for coal delivered FOB at the bargehead in the town of Alloy, on the Kanawha River about 10 miles south of Dixie. The economics of the coal business is not made very clear in this case, but adding the cost figures for royalties, transportation, taxes, and fees to the $13 figure Clevinger claimed he was paid per ton by Bright, it would appear that it would cost Bright the $13-per-ton fee to Brier, then the cost of the preparation plant located at the mine entrance, and about $11.38 of royalties and additional costs enroute to receive $28.50 per ton at the bargehead for a profit of somewhere around $3 a ton. If you amortize the costs of the additional equipment Bright was buying for Brier, the profit is even less, or nonexistent.

[35] A roof plan shows what methods are to be used by the operator in assuring that the roof is safe. In the case of mine 2 this was to take the form of a bolted ceiling, with the numbers of bolts, spacing,

Continued

to the district manager of NMSHA, stating that fact and agreeing to assume all existing/mining plans, including the roof plan. According to Copley, the change in ownership (or operators) would not require a change of plan.

In the summer of 1989, there was a roof fall at mine 2. Copley investigated this incident and ordered revisions to the roof plan which required the use of four or 5-foot fully grouted resin rods[36] throughout the mine.

Other than on the occasion of this fall,[37] Copley was in mine 2 at other times, including a visit on January 25 and 26, 1990. On the basis of his observations of mine 2 he stated that ''generally, with the exception of those two falls, the top was pretty good.''

In connection with this opinion, Copley was asked about the term ''rider seam.'' He described a rider seam as a seam of coal which runs 3 to 6 feet above a coal bed, and above the roof, or top. It is not a problem when it is high enough, but can become a problem if it comes down closer to the roof. Coal is a softer material than the rock in which the roof bolts must anchor themselves, and if the rock strata are thin and there is coal close to the roof and extending up to where a bolt must anchor, then some alternative safety measures must be taken. Copley indicated that he was aware that there were rider seams in both mines 1 and 2 at Brier's location.

He described a number of methods used in the ''very hazardous'' task of roof control. Besides bolting, which is, apparently, universally used, he mentioned cribbing, using 6-inches square wooden blocks laid cross ways from floor to roof; cross bars or headers, wooden beams either bolted to the roof, or supported from underneath; bearing plates, like washers, about 6-inche square, at the lower end of a bolt at the roof line; strips, strips of metal about one-sixteenth of an inch thick, used mostly for ''sloughing roof,'' where stones, dirt or gravel are falling down; and planks, about 1-inch wide and 8- to 10-feet long, used for roughly the same purpose as strips. Any or all of these methods can be used for roof problems.

Early in 1990, Mark March Jr., an International representative and area organizer for the Brier location, had been contacted by Jimmy Duffield about organizing the Brier mines. March participated throughout the campaign. On March 2, Mark March was notified that mine 2 had been closed down. On Monday, March 5 he contacted Jim Jenkins at NMSHA and told him that he had been informed that mine 2 had ''severe top conditions,'' and that all the employees had been laid off.

Jenkins, who was the supervisor of Copley's work group, notified Copley to inspect mine 2. Copley, together with Leo Inghram, the regular mine inspector for the Brier properties, went to mine 2 on March 8 about 8 a.m. When they got there, Copley and Inghram talked to Clevinger who said that the mine was idle, but since some equipment was still inside, Copley assumed that people were going to be in there was well, to service or remove the equipment. He therefore decided to go inside to test the roof. At this time Clevinger had a broken foot and was unable to go inside the mine, but Richard Fitzwater accompanied the inspectors into the area where the bad roof had been reported.[38]

When they arrived at the face where the problem had been encountered, Copley visually inspected all five entries at the face. He testified that the roof looked ''pretty good,'' that is, there were no cracks, it was not broken up, and looked solid. He then tested the roof with a hammer, striking it and listening for a solid or a hollow sound. He noted that at the number three entry the roof sounded ''drummy,'' a hollow sound, as if you hit a drum, or a dishpan, not a clear ring.

Copley's opinion, qualified by his limiting the opinion to what he could see with his naked eye, was that, as far as he could see, and what the visual indications showed, there was not anything to get alarmed about. He then qualified this opinion by stating ''to make a real good decision, it'' (a stratascope) should have been used.[39] You needed to go about 10 or 11 feet up to get a ''real intelligent idea of exactly what was up there.'' Copley further observed that based on what he saw, and what Fitzwater reported to him, he thought that ''the top could have been controlled. It didn't look all that bad. In his opinion, timbering, or the use of longer bolts could have controlled even a 20-foot span of roof.[40]

After he finished his examination at the mine face, Copley returned to the entrance, where he had another conversation with Clevinger. Copley recommended to Clevinger that they ought to look at the roof though a stratascope. Copley then asked if Clevinger wanted to take a stratascope and look at the roof, or did he want to have Copley to get his office stratascope to look at it. Clevinger answered ''no, I think we've decided to shut it down, so I don't see any use in it now.'' Copley did not issue any warning or citation, nor did he recommend any change in the roof plan, because of Clevinger's statement that he was not going to run the mine any longer.

Sometime in May, Copley thought it was between May 9 or 15, or so, Clevinger called him and said that he wanted to seal up mine 2 and asked Copley to bring a stratascope and look at the top. Copley felt that he should check with his supervisor, or Rosiek. Rosiek asked about the cir-

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and sequence of installation mandated by plans drawn by Copley's office.

[36] The resin grouted rods (or bolts) are designed to form a firmer bond in the roof. As the resin hardens it adheres to the roof material as well as to the rods, forming what Copley described as a ''beam,'' like plywood, where the whole is stronger and more rigid than each part. Also, the ''feedback'' of excess resin coming out of the bolt hole gives an indication of the condition of the roof. If there is no leakage, this indicates, according to Copley, that there are cracks in the material up above, which will absorb the excess resin and result in less or no leakage. The existence of cracks could indicate dangerous conditions.

[37] There was another fall in 1989 but Copley did not investigate that one.

[38] Before going in, Copley checked a record known as the ''fire boss book,'' in which incidents such as a bad roof are required to be reported. There were no reports of the March 2 bad roof incidents. Fitzwater admitted that it was his job to make such entries in the fire boss book, and that he had just neglected to do so.

[39] A stratascope is a tube about 11-feet long which is inserted in a drill hole in the roof and will reveal cracks, coal seams, and laminations, and will tell the observer whether the roof is solid or soft. These instruments are expensive, and in Copley's office there is only one available for four inspectors. Ordinarily the inspector does not carry the stratascope in his car, but arranges to use it when it is requested, or he feels it is necessary.

[40] But Copley qualified this latter in his testimony by saying that he would have liked to have looked at the roof (through the stratascope) before requiring longer bolts.

cumstances of this situation and when Copley told him, he said that if they wanted to reopen, or start back up, they would do it, but just for what Clevinger wanted, they would not go in with the stratascope. Rosiek told Copley to tell Clevinger that there were private contractors for work of that type. Copley told Clevinger what had been decided, and that there were private contractors for this, and Clevinger replied, ''No, they wouldn't believe anything I said anyway.[41]

In September 1990 a mine inspector reported bad top in Brier's mine 1. At about the same time Clevinger called Copley had asked him to come over with his scope. He said they had to do something. There were no falls, but the top was broken up and water was leaking in. Copley went over and found a ''streak'' of coal at 21 inches up in the top, then some dark or light rock, another streak at 35 inches, then dark at 48 inches. It began getting firmer at 54 inches, had another streak at 62 inches, then firm at 78 inches. One of these ''streaks'' was at least 18 inches thick. Copley recommended installing 4-foot and 6-foot bolts in a staggered pattern and dropping the entry width to 18 feet.

Later, on October 22, they had a roof fall in mine 1. Copley again went over, and found a rider seam 6 or 7 feet up. He recommended 4 and 6 foot both in a staggered pattern, and the use of timbers to aid in showing up the roof.

Respondent presented a witness named Gregory Smith, vice president for Coal Geology for Stagg Engineering Service. Smith's experience included academic as well as practical deep mining experience. He has a Master's degree in coal geology from the University of South Carolina, he has taught and published articles on Coal geology, and has worked for various companies engaged in underground coal mining since 1974. He is certified as a geologist by the State of South Carolina, and is a member of he Society of Mining Engineers. I do not have any question, and no objection was raised, to Smith's testifying as an expert in this matter.

Smith's employer, Stagg Engineering, had done work for the Company (NERCO) that acquired this property in 1989, and had been in mine 2 at that time. I do not feel that Smith's professional judgment was influenced by this prior business relationship, and I found him, like Copley, to be a candid and credible witness.

In July, Smith was retained by Brier to come out and look at the roof conditions at the south face of mine 2. He inspected the area where the bad top was said to be, and, in his opinion, found a condition which he described as ''potentially very hazardous.'' He based this opinion on his visual inspection, conducted by shining his cap lamp up these 1 inch drill holes and visually observing the layers as he looked up into the holes. He stated that the interval up to the rider seam ''appeared to be less than three feet, more like two feet, or in that vicinity.''[42] hen a rider seam is that close, Smith said, there is little layered rock, and there is less chance of a warning by cracking and chipping along the wall of the mine which may foretell an impending fall. It was his opinion, further, that with this rider seam overhead, continued mining to the south would encounter rapidly deteriorating conditions. The rider seam itself is a problem, but in addition, the seam affects the area around it. The roots of ancient vegetation cause fractures of underlying sediments, fire clays or sandy clays, conditions which occur directly under a coal bed. The fractures remain closed, but when mining is done underneath these areas, the fractures begin to spread in all directions, with air and moisture adding to the problem.

Based on his observations and experience, Smith stated as his opinion that it was unsafe to continue to mine in the southerly direction from where they had stopped in March.

As far as methods to contain the bad roof problem, Smith stated that there were technically sound methods of containment available. He mentioned truss bolts, effective but ''enormously expensive and they're very time consuming to install;'' or longer bolts, up to 8 feet, but they are difficult to install in a low coal area where the roof is under 4 feet. Bolts must grooved, or bent, in order to install them in the roof; or straps or strips to keep rock from falling out between the bolts.

Smith recalled another mine with a series of rider seams (or beds) above the roof, where a system of truss bolts, straps, a concrete ''doughnut crib'' and timbering was used to control the roof, but more than doubled the cost of removing the coal if all that roof support had not been necessary.

While Smith admitted that these sorts of controls, truss bolts and cribs, could allow safe mining, it would increase the cost of mining from $15 to $24 per ton.[43]

It seems to be undisputed that the bad roof condition, caused by the presence of a rider seams, or bed, of coal running anywhere from 18 to 36 inches above the roof line, made working dangerous. Copley viewed this condition less seriously than did Smith, but both agreed that something would have to be done about it.

Both experts agreed also, on the facts that their examinations of the roof were not as thorough as they should be, Copley thought he should bring his office stratascope to the site, and Smith admitted that his examination of the area resulted in conclusions which were only an approximation of the actual conditions in the roof.

Copley and Smith did agree that the conditions they found, or which they believed to be present, could be controlled by means of longer bolts or staggered placement of bolts, in Copley's opinion, or by means of truss bolts, timbers, and cribbing, by Smith. Copley did not estimate costs, but I can infer from the testimony that the methods suggested by Copley[44] would have been cheaper than the $9 or so per-ton estimated by Smith for his control systems.

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[41] Clevinger admitted that his request in May was because of an ''allegation'' about the roof and he thought he might need verification that the roof was bad. There was no indication in his testimony that he ever considered using a private contractor to conduct a stratascopic inspection. Possibly he was already convinced that the Board's Regional office would not believe a private contractor's word if that contractor was hired by Brier. That might explain his last remark to Copley, but the fact is he did not do it.

[42] Smith noted that he was able to observe this in the test holes on the left hard entries, but not on the right. Some test holes were filled up with mud, and no observations could be made of roof conditions in these holes. He stated that he was able to makes his observations in three test holes, but later admitted that his estimates were only an ''approximation.''

[43] I note that Clevinger stated to employees that he was getting $13 per ton at the mine entrance, and also Respondent's exhibit on the cost of cutting through the fault, which gave a price of $28.50 per ton at the bargehead at Alloy.

[44] Which he later recommended for roof control in mine 1, and which were adopted by Brier.

However, at the time he decided to close mine 2, Paul Clevinger did not have the benefit of these substantially similar expert opinions about the nature of the roof problem, its effect on working conditions at the south face, and the possible means of control of the danger. Clevinger had the reports from Runtz, on the early morning shift on March 2, then the reports from Gunning on the test borings made by the first shift. At that point, his action in timbering off the dangerous area,[45] and moving back mining equipment from the danger zone, and, after that was done, dismissing the employees.

The testimony of the employees indicated that they felt that the roof was dangerous, but, generally, not more so than at other places in the mine.

At this point, Clevinger had to think of what to do. I believe his testimony that he thought all along that Bright Coal would pay the costs of driving through the fault into the reserve coal beyond. Certainly the estimates of a million tons in the reserves would make such action at least arguably profitable for both Brier and Bright. Bright had had an estimate of the costs, $752,778, of driving through the fault and the low coal area beyond, at least since February 15, and it is likely that Brier also knew of these estimated costs. But on March 5, the Monday after mine 2 was closed on Friday morning, Bright, through Tim Ross, informed Clevinger and Maynard that they had decided not to go through the fault. This was the point at which Clevinger and Maynard decided they would no longer operate mine 2. In the same conversation on the morning of March 5, they informed Ross that ''under existing conditions and without financial support'' they did not want to continue to operate the mine and wished to terminate the mining agreement for that mine. Ross agreed to release Brier from their contract and further agreed to memorialize their conversation in a written notice of their mutual agreement to terminate their contract effective March 6, 1990.

Ross did not testify, and neither Maynard nor Clevinger testified about any consideration being given to continuing in the south direction which had been laid out by Bright Coal after the northern route around the fault was found to be impractical. Nor was there any testimony that Maynard and Clevinger considered taking steps to control the bad roof in the southern entries. Clevinger had 17 years' experience as a miner, a supervisor, and an operator. He must have experienced bad top during his years in the business. He must have known, at least generally, what methods were available to control the top. But Clevinger mentioned none of this to Ross in their March 5 conversation. Once Ross said that Bright Coal was not going to pay to drive through the fault, Clevinger and Maynard said we do not want to continue to operate this mine. Raving made that decision, on March 7, Maynard and Clevinger sent letters to all of the employees of mine 2, and the Hoot Owl, midnight, shift, that their layoff was to be ''permanent with no expectation of recall.'' The letter went on to explain this action by ''the size of the geologic fault and we have no hope of ever reopening this mine, it has deemed it necessary [sic] to effect this permanent reduction in the workforce.''

When Copley arrived at mine 2 on March 8, at the request of the Union, the decision to close had been made, Brier's contract with Bright had been rescinded, and all of the employees permanently laid off. When Copley offered, indeed, recommended at the conclusion of his inspection that he get his stratascope and come back, Clevinger declined, saying he had already decided to shut it down. Even taking into consideration the fact that Clevinger had already decided to shut down mine 2, this reception accorded Gopley contrasts sharply with the September 1990 incident at mine 1, where, instead of shutting down the mine, Clevinger called Copley asking him to bring a stratascope and to make recommendations on the bad top at mine 1.

In summarizing this evidence, I can understand Brier's concern about the top at mine 2. I would have difficulty in finding a violation here if I were convinced that the south entries were too dangerous for miners to work in and could not be made safe. But the evidence shows that this was not the case. Both Copley and Smith agreed that the roof problems in mine 2 could be controlled. A similar problem in mine 1 was controlled later in 1990, without resorting to the extraordinary and expensive methods mentioned by Smith.

Why, then, was some sort of roof control not even discussed by Brier and Bright, or between themselves by Maynard and Clevinger, the principals in Brier. There was no evidence that any discussions took place, and no evidence as to why not. The absence of any reason or rationale leaves open only the inference which I draw, that there was another reason for the decision to close, so casually and precipitously, even before the mine was inspected by the NMSH. That reason is, of course, the reason advanced by the General Counsel, that the Respondent wanted to rid itself of the majority of union adherents. Those adherents were mostly in mine 2 and on the Hoot Owl shift. This reason is borne out by Respondent's later actions in a similar situation at mine 1, and, of course, by the substantial evidence of threats, intimidation, interrogation and the impression of surveillance revealed through the testimony of a number of witnesses.

I, therefore, find that the closure of mine 2 and the temporary and permanent layoffs of the employees of that mine and the Hoot Owl shift, was caused by the union activity of a number of employees of the affected groups, in violation of Section 8(a)(3) of the Act. *Hedison Mfg. Co.*, 249 NLRB 791 (1980); *Jacobs Marti & Sons*, 264 NLRB 30 (1982).

E. *The Status of Charles Alley and Hammond Hanshaw*

1. Haymond Hanshaw, one of several brothers working at the Grassy Fork (Barbara Lynn) complex, had been employed by Mike Hill, of Hill Enterprises who operated mine 2 up to August 1989. On January 10, 1989, Hanshaw was injured on the job. He returned to work on March 8, but received a back injury on May 13, 1989, and was not released to return to work until March 10, 1990.

Arid Hanshaw, Haymond's brother, was still working for Brier at mine 1 at the time he testified in this matter on October 23, 1990. Arid Hanshaw testified that he attended a meeting called to discuss the takeover of the Grassy Fork mines by Brier. Maynard and Clevinger were there, as was Tim Ross from Bright Coal, and Mike Hill, the departing employer. In response to a question about the employees Tim Ross said that the new company was going to keep all of the Hill Enterprises men. Clevinger said the same thing. Arid asked about an employee named Willard Brown, who was out of work with a heart attack, and about his brother

[45] By placing upright timbers to prevent access to the area.

Haymond. Ross and Clevinger replied that they were going to take all of Hill's employees and that everything was going to be the same.

Shortly after that meeting, Arid's supervisor, Charles Shawkey, gave him two copies of an employee handbook issued by Brier for its employees. One of these was for Arid and the other was for his brother Haymond.[46] Arid delivered the handbook to Haymond.

Haymond himself testified that shortly after Brier took over, on August 16, 1989, he went to the mine and talked to Paul Clevinger about his job. Clevinger told him that they had taken over the mine, and that they would take all of Hill's men. He assured Haymond that ''when they release you, your job's waiting on you.''

When Haymond was finally released by his doctor, on March 10, 1990, he again went to the mine. He talked to Maynard, and was told ''I'm sorry, you are no longer employed here.'' Maynard said something to the effect that Haymond was not ''excepted''— (accepted?) in the contract when the mine changed hands.[47]

In these circumstances, it is undenied that Clevinger assured employees that under Brier everyone would be continued on as it had been. Clevinger assured Arid Hanshaw that they were going to take all of Hill's employees. He assured Haymond who was interested enough to come to the mine on August 1989 that when he was released by his physicians, his job was waiting.

Thus, I find that Haymond Hanshaw continued as an employee, like all the others, until March 2, 1990, and was affected, like all the other employees at mine 2, by the temporary, then the permanent layoffs on March 2 and 5.

2. Charles Alley applied for work at the Grassy Fork complex early in 1990. Maynard called him later and offered him a job as a bolter. Alley said he was not qualified to do that job. Later he received a second call from Maynard, who told him that the Company would move someone else to the bolter job and offered Alley a job as a belter.[48] He accepted and reported to work the second shift at mine 2 on February 5. He was not told whether the job would be temporary or permanent.[49] Alley was an active and vocal union adherent, as noted above, but there is no allegation in the complaint, nor any indication in the record that his union activity led to his layoff on February 23. On that date, after completing the shift, Alley was told by his supervisor, Jerry Taylor, that an employee named Brian Brown was coming back from an injury, and Alley was the junior man there. Alley asked Taylor if the layoff was temporary or permanent, but Taylor did not know, and he told Alley to see Clevinger or Maynard. Alley did return to the mine on the next working day, February 26, and spoke to Fitzwater and later to Maynard. Both of these men said that they did not know whether the layoff would be permanent.

After the further events of that week of February 26, Alley received a notice of permanent layoff dated March 5.[50]

Under these circumstances, I find that Alley was only temporarily laid off on February 23, that he had a substantial likelihood of being recalled if the mine had remained open, was treated just like all of the other employees of mine 2 and is entitled to be included in any remedy provided for those employees.

F. *The Challenged Ballots*

Since I have found here that all of the 23 individuals named in the complaint were discriminatorily laid off permanently on March 5, it follows that those who voted in the election on April 5, and whose ballots were challenged by the Employer, were entitled to vote.[51] I, therefore, recommend that the challenges to their ballots be overruled, their ballots be opened and counted, and that the Board issue a certification based on the results of the election including these challenged ballots.

IV. THE REMEDY

Having found that the Respondent, C. M. Brier Corp., has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom, and that it take certain affirmative action designed to effectuate the policies of the Act.

Since the Respondent is a contract miner, in which capacity it supplies mining services to others who own or have rights to mine coal,[52] and since Brier has agreed with the proprietors of these mines to discontinue mining in mine 2[53] and to the recession of their agreeent under which Brier was operating mine 2, I can, and will, recommend only that the Respondent reinstate the employees named in the complaint to their same or substantially equivalent positions in case it or its successors or assigns resume contract mining of coal whether in the State of West Virginia, or elsewhere. *Beech Branch Coal Co*., 260 NLRB 907 (1982); *Williams Motor Transfer*, 284 NLRB 1496 (1987).

I will further recommend that the Respondent be required to make certain of its employees whole on account of the discrimination against them by the payment to them of sums of money representing earnings to which they would have been entitled in the absence of such discrimination, from March 2, 1990, until such time as such employees shall have obtained substantially equivalent employment with other employers, less interim earnings. These sums would be computed on a quarterly basis in the manner prescribed in *F. W.*

[46] Shawkey, as noted above, testified in this proceeding, but was not asked any questions about this incident.

[47] Neither Clevinger nor Maynard testified about Haymond's status. Tim Ross, of course, did not testify.

[48] This involved maintenance and mechanical work on the belts used to carry coal from the mine face to the entrance.

[49] While he was in his second week of work Alley was told by Fitzwter that Brier was planning to lease a ''Marietta'' miner, a heavier machine than those used to mine coal, to drive through the sands tone fault. Since Alley had been a miner operator before, they were going to have him run the Marietta through the fault. As has been noted, right Coal declined to underwrite the lease of the Marietta miner, or the drive through the fault.

[50] None of the employer's witnesses, Taylor, Fitzwater, or Maynard, testified about this incident. I find that Alley's version of events is credible, logical, and undenied.

[51] All of those employees named in the complaint as having been laid off with the exception of Mark Acord and Larry Boggs, who did not vote.

[52] Bright Coal, or its current principal, NERCO, are not parties to this proceeding, and no order issued here can affect them.

[53] I note the receipt of a letter from Brier's counsel dated December 3, 1990, stating that as of November 20, 1990, Brier has ceased all operations. I leave consideration of this communication to the compliance stage of these preceedings.

Woolworth Co., 90 NLRB 289 (1950), with interest thereon as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

CONCLUSIONS OF LAW

1. C. M. Brier Corp. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Mine Workers of America is a labor organization within the meaning of the Act.

3. By threatening its employees with closing of its mine in Dixie, West Virginia, the Respondent has violated Section 8(a)(1) of the Act.

4. By interrogating its employees about their union affiliations and activities, the Respondent has violated Section 8(a)(1) of the Act.

5. By giving to its employees the impression that their union activities were under surveillance, the Respondent has violated Section 8(a)(1) of the Act.

6. By closing its mine 2, temporarily, on March 2, 1990, and then permanently on March 5, 1990, and by laying off employees in that mine, and other employees who worked on a late night maintenance shift both in mine 1 and mine 2, Respondent has violated Section 8(a)(3) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]